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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Changes to the Board of	)	
Directors of the National Exchange	)	CC Docket No. 97-21
Carrier Association, Inc.	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

COMMENTS SUPPORTING PETITIONS FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Several carriers have filed petitions for reconsideration of the Commission's October, 1999 decision directing its e-rate program administrator, USAC, to seek reimbursement from carriers, functioning as vendors to e-rate program beneficiaries, whenever USAC commits e-rate funds that must later be reversed due to detection of errors or fraud. The problem with the Commission's chosen reimbursement mechanics is that they do nothing to provide appropriate incentives to the party best able to detect or prevent a fraud or mistake from doing so. The Order's absolute approach to holding a carrier financially liable, if not modified, will have a significant adverse impact on the resources carriers are willing to put into making the e-rate program work, thereby reducing the availability of a wide range of suitable services for schools and libraries.

Nextel agrees with the petitioners that the carrier-only reimbursement mechanism of the Order must be reconsidered as it is not supported by any factual, legal or policy basis. As an initial matter, it is far from obvious that the Commission's assumption that the Debt Collection Improvement Act applies at all to e-rate funds. Further, the Supreme Court precedent cited by the Commission as compelling reimbursement in fact is not applicable to the e-rate program. Thus, at the very least, with respect to non-statutory violations of Section 254, the Commission has broader discretion to fashion a remedy than the Order implies. Given the adverse impact the decision will have on the overall success of the program, the Commission should exercise its discretion on the collection of these disbursed funds in a fair and equitable manner.

Fundamentally, the Order appears to have misfocused on which entities are the program's actual beneficiaries. While the carrier performs a role of supplying the services

ordered from schools and libraries and is a conduit to the schools for the application of the service discounts, it is the schools and libraries, applying for and receiving program grants, that are the beneficiaries under the e-rate program. Requiring the service provider to reimburse USAC for a mistake or fraud by an educational institution improperly shifts the beneficiary's financial liability to an innocent vendor.

The harsh penalty the Order imposes on carriers is ill-considered in that it ignores general federal government guidelines on the scope of a vendor's responsibility under a grant program. It also fails to review the mechanics of reimbursement requirements of similar federal government grant programs such as the Pell Grant program. In the Pell Grant program, once the Department of Education has determined the eligibility of a student for federal financial assistance, the educational institution implementing the assistance is entitled to rely upon this determination. If later there is any problem related to the accuracy of the information submitted in the student's grant application, the Department of Education pursues reimbursement from the student and not the educational institution that functions as a funding conduit. This framework for dealing with applicant errors or fraud encourages universities to participate in the Pell program.

Here, the Commission has adopted, without analysis or public notice, a policy that leaves the program enforcement problems at the carriers' doorstep. Even if the Commission has no concerns about the impact of its decision on carrier's incentives to support the program, it cannot ignore the incentives it creates for potential applicants who know they may not be held accountable if they inappropriately receive discounted services. Additionally, the Commission cannot ignore that recovering funds from carriers does not actually reverse the discount that was incorrectly applied and as a result, the school or library might ultimately get

something for nothing. This is a case of unjust enrichment that the Commission has to address on reconsideration. Consistent with prior Commission statements that it intends to hold the party who has made the error or committed fraud responsible, the Commission has the authority to order USAC to seek reimbursement from that party.

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Nextel Communications, Inc. ("Nextel"), hereby files comments supporting the petitions for reconsideration filed by The United States Telecom Association ("USTA"), MCI Worldcom and Sprint on the Commission's October 1999 Order (hereafter the "*Adjustment Order*").[1] In that Order, the Commission directed its administrator, the Universal Service Administrative Company ("USAC"), to seek repayment of erroneously or illegally disbursed

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[1] Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, *Order*, CC Docket Nos. 97-21 and 96-45, FCC 99-291, 1999 FCC Lexis 5065, 17 CR 1192 (released October 8, 1999) (the "Adjustment Order"). On the same day the Commission issued another order waiving, for the first year of the program, the requirement of carrier reimbursement for those errors that did not constitute statutory violations. See changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, *Order*, CC Docket Nos. 97-21 and 96-45, FCC 99-292, 1999 FCC Lexis 5066, 17 CR 1195 (released October 8, 1999) (hereafter the "*Waiver Order*").

funds from service providers, rather than from the schools and libraries that apply to USAC to receive discounted services under the Commission's "e-rate" program.[2]

As discussed below, the Commission erred as a matter of law in automatically assuming that e-rate program funds are subject to the terms of the Debt Collection Improvement Act ("DCIA").[3] Even if the Commission reasonably could construe e-rate funding as appropriated U.S. Treasury funds subject to the DCIA, the Commission failed entirely to reconcile its decision holding carriers liable for over-committed funds with its prior statements that the beneficiary school or library is financially responsible for its own errors, fraudulent statements or for the misuse of services. Further, the Commission failed to provide any reasonable basis for holding carriers liable for a "debt" that is owed by the school or library. On reconsideration, the Commission should correct these errors. At the very least, the Commission must provide sufficient explanation of the reasons it believes it is legally constrained from collecting over-committed funds from the party who was in the best position to prevent the over-commitment.

Failure to review and modify the *Adjustment Order* will adversely impact the success of the e-rate program. If carriers are to be placed in the untenable position of not only administering the discount program, but having to become the ultimate guarantors against errors or fraudulent misuse of services, then there will be very few carriers that will go the extra mile to participate in and support the program with the allocation of internal company

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[2] Whenever funding commitments had been made to schools and libraries but the whole payment has not yet been made, the Commission directed USAC to cancel the existing funding commitment and deny any request for payment from service providers.

[3] 31 U.S.C. § § 3701 et seq.

resources. As a result, the intended beneficiaries of the e-rate program, i.e. eligible schools and libraries, will not have access to the variety of competitive telecommunications services available in today's marketplace.

As a carrier that has committed significant company resources to raising school and library awareness of its wireless service products that can enhance the educational experience, Nextel supports the goals of the program. However, if the Commission fails on reconsideration to take account of the serious legal and policy issues raised by the *Adjustment Order*, Nextel will have to reevaluate its ability to participate broadly in the program in light of this potentially significant unfunded liability the Commission is imposing on service providers. Other non-incumbent operators will be faced with the same choice, and the quality and range of services made available to eligible schools and libraries under the program will be significantly reduced.

To avoid this, the Commission should consider alternative discount recovery mechanisms that more closely align discount recovery responsibility with discount benefits: the party in the best position to control or correct an error or to prevent fraudulent use should be financially responsible for their error or fraud. In some cases, that may result in the service provider having to reimburse USAC, such as where the particular service provider is not, in fact, a "telecommunications carrier" as may be required under Section 254 as a condition of funding eligibility. In some cases, the program beneficiaries, the schools and libraries that apply for discounted services and certify that their use is consistent with Commission rules and USAC policies, would be called upon to return discounts they erroneously, or possibly fraudulently, obtained. As discussed below, such an allocation of responsibility is consistent with other federal agency beneficiary programs and has the positive effect of making all the

parties responsible for their own errors or misstatements, as the Commission originally envisioned.[4]

I. THE DEBT COLLECTION IMPROVEMENT ACT DOES NOT APPLY TO E-RATE PROGRAM FUNDS

Nextel concurs with the analysis in USTA's Petition for Reconsideration that the Commission erred in making the unexplained assumption that e-rate funds are U.S. Treasury funds appropriated by Congress and, as such, subject to the terms of the Debt Collection Improvement Act ("DCIA").[5] This results in a further unexplained assumption that, in all cases, there is a "debt," as that term is defined in the DCIA, that must be compromised or collected by the government whenever an error results in e-rate funds being committed in violation of Section 254 of the Communications Act or of the Commission's rules or USAC procedures.

E-rate funds are not general tax funds raised under Congress' taxing authority. In fact, courts reviewing Section 254's universal service assessments have concluded that the funding is not a tax.[6] USAC collects the funds disbursed under the program from service providers. Service providers must make "mandatory contributions" to the e-rate fund according to a

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[4] Nextel has participated in a group of concerned carriers that have provided the Commission with an alternative reimbursement proposal. Ex parte notice filed February 1, 2000 by USTA et al. in CC Docket 96-45 and CC Docket 97-21. Nextel urges the Commission to consider that proposal or other alternatives in preference to the draconian measures of the *Adjustment Order*.

[5] Petition for Reconsideration filed November 8, 1999 by United States Telecom Association ("USTA Petition") at 3.

[6] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999), *cert. denied sub nom,* Celpage, Inc. v. FCC, 120 S.Ct. 2212 (2000) (here after "*Texas PUC v. FCC*").

USAC-administered contribution factor formula based upon each provider's telecommunications revenues. Congress does not specify any program funding level or appropriate funding mechanism for the program. As a result, USAC, as an agent for the Commission, collects and distributes e-rate funding under direction from and pursuant to Commission rules. Funds that are incorrectly committed to applicants by USAC, or that are obtained based upon misstatements of eligibility status by a provider or an educational institution are not U. S. Treasury funds. They are funds collected by USAC on the Commission's behalf that are never commingled with U.S. Treasury funds. Fundamentally then, the e-rate program is a government grant program funded by assessments on carriers. While Nextel agrees that all parties should act responsibly in applying for and otherwise accounting for use of these funds, at base they are not U.S. Treasury funds that are covered by the terms of the DCIA.

Further, only government "debts" are encompassed by the DCIA. Under the DCIA, a "debt" or "claim" is any funds or property that an appropriate federal official has determined is owed to the United States by a person, organization, or any entity other than a federal agency.[7] In other words, an overpayment made by USAC is not a "debt" that the government is obligated to act to recover until the Commission or USAC, operating under specific Commission authority, determines that a specific amount is owed to the government. Thus, where there is an error in an e-rate funding decision that violates the provisions of Section 254, the Commission or USAC must specifically declare the amount of the debt owed. On the other hand, in the instance where there is an error in apparent violation of a Commission rule or

USAC procedure, rather than a violation of the bedrock terms of the statute, the Commission, at the very least, has the ability to waive its rules and under the express terms of the DCIA, to determine that there is *not* a "debt" that the government must collect.

The Commission plainly recognizes that it has far broader discretion to fashion an appropriate remedy whenever the error or mistaken reliance was based on a good-faith interpretation of Commission rules or the USAC "eligible services" list. On the same day as the *Adjustment Order,* the Commission issued its *Waiver Order*, that waived any repayment obligations for those situations that constituted non-statutory violations of Section 254. The Commission distinguished statutory and non-statutory violations by observing that Commission and USAC rules, procedures and implementing mechanisms are not specified in the statute. The Commission also recognized that "procedures that are not 'required by statute'," can be waived.[8] The Commission determined that it would be unfair to seek reimbursement of overpayments from carriers in the first year of the program, particularly given the level of notice USAC had provided and the inability of carrier vendors to determine whether an educational institution complied with Commission rules and USAC procedures absent notification from USAC. For the same reasons, the Commission has the authority to choose to waive over-commitments that result the mistaken funding of services that are not eligible pursuant to USAC's eligibility list. Where the over-commitment results from the violation of the statute, e.g. an ineligible applicant or an ineligible service provider, and the Commission

[7] 31 U.S.C. 3701 (b) (1).

[8] *Waiver Order* ¶ 6.

believes it cannot waive this over-commitment, it should seek recovery from the party best positioned to have known and/or prevented the erroneous e-rate commitment.[9]

The Commission needs to be aware that the status of eligible and ineligible services as contained in USAC's eligible services list is not a beacon of clarity. Many services are fundable only on a conditional basis, and USAC personnel often give conflicting informal opinions to carriers and applicants regarding the funding status of particular services and their uses within the educational environment. Nextel's own experience demonstrates that USAC processing personnel, reviewing funding requests, do not always apply the same criteria accoss the board, resulting in grants and denials of similar funding requests. Thus, the Commission should be very cautious in assuming that a carrier really is in the best position to know or prevent a program applicant from specifying a non-eligible service on its e-rate application.

For the reasons stated in these comments and the petitions for reconsideration filed on the *Adjustment Order*, Nextel believes that USAC's provision of the additional notice -- now contained in commitment letters to e-rate applicants from USAC -- that discount funding, once committed, can be reversed, begs the central question. Are carriers in the best position to detect program non-compliance by other parties? In the *Waiver Order*, the Commission justified its waiver by observing that carrier vendors are simply not in a position to determine whether an educational institution applicant has made an error or fraudulent statement that, if subsequently detected by USAC, could result in triggering a carrier's obligation to reimburse

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[9] In the *Waiver Order*, the Commission concluded that it had "no discretion to waive violations of [] statutory requirements." *Waiver Order* at 11, fn. 22. The Commission observed that carriers relying upon USAC and program applicant representations of service eligibility

USAC. This continues to be true whether or not USAC notifies carriers of the possibility that USAC may institute collection procedures against them for a school or library's mistake or wrongdoing. Such notice offers the carrier no avenue for preventing or correcting errors since it has no control over the application and grant process. The notice does nothing more than create a significant unfunded liability for those carriers participating in the e-rate funding.

II. CARRIERS CANNOT BE HELD ACCOUNTABLE FOR REIMBURSEMENT OF DISCOUNTS USAC MISTAKENLY COMMITS TO SCHOOLS AND LIBRARIES

The Commission's sole stated rationale for directing USAC to recover funds from carriers was that the carriers are currently the entities that USAC pays to make the carrier whole after the carrier has provided eligible institutions with discounted service. As the Commission previously noted, however, the reimbursement to carriers rather than to eligible institutions is merely for the "administrative ease" of these institutions that would otherwise have to pay the carrier's full invoice price for services rendered and then later have the discount refunded to it by USAC.

It is not obvious from the *Adjustment Order* whether the Commission believed that it is somehow compelled by any aspect of the Communications Act to seek repayment from carriers rather than the e-rate program beneficiaries. If there is such a belief, it is misplaced.

were in a materially different position than vendors who know, or should have known that they were not eligible for telecommunications services support.

There is no support in the Communications Act for holding carriers responsible for USAC errors, or errors, misrepresentations or misuse by e-rate program beneficiaries.[10]

A. The *Adjustment Order* Misunderstands the Carrier Role As Conduit, Not Program Beneficiary

Section 254(h)(1)(B) of the Communications Act requires that any telecommunications carrier provide, upon a *bona fide* request, services for educational purposes to elementary and secondary schools, and libraries at discounted rates.[11] Carriers are entitled under the Act to either: (i) receive reimbursement using the support mechanisms in place, or (ii) have the amount of the discount treated as an offset of their obligation to contribute to the universal service support mechanism.[12] The Act's legislative history confirms that the program is intended to ensure that is intended beneficiaries - - schools and libraries nationwide - - have affordable access to modern telecommunications services.[13] The willing participation of carriers is of critical importance to the proper functioning of the program. Indeed, Section 254(h)(1)(B) establishes an enforceable substantive guarantee of a statutorily-based system of

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[10] Nextel believes, however, that it is reasonable to hold service providers financially responsible if they are not eligible to provide service under the program as they are in the best position to determine their individual eligibility.

[11] Services with an "educational purpose" are included in the definition of universal service under section 254(c)(3) of the Act.

[12] 47 U.S.C. 254(h)(1)(B).

[13] *See* H.R. Conf. Rep. 104-458 at 132 (1996) reprinted in 1996 U.S.C.C.A.N at 144.

reimbursement that provides assurance that carriers will receive compensation for the services they render to program beneficiaries.[14]

While the *Adjustment Order* does not examine in any detail the distinctly different responsibilities of service providers and program beneficiaries, there are many indications in the Communications Act and the Commission's rules that service providers were not intended to be "enforcers" of the program or guarantors of other parties' compliance with program guidelines. Nevertheless, rather than directing USAC to collect funds from the parties that may have committed innocent or deliberate errors, or from parties that misstated their program eligibility or misused services in a manner that renders them ineligible, the *Adjustment Order* puts carriers in the untenable position of reimbursing USAC for a range of errors that may well have been caused by either the program administrator or by the program's beneficiaries.

It is important to note that neither the Act, nor the Commission's e-rate rules, nor any other Commission order imposes any specific program compliance accountability on service providers.[15] The Commission's seminal decision creating the e-rate program, the *USF Order*,

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[14] 47 U.S.C. 254(h)(1)(B). " A telecommunications carrier providing service under this paragraph shall (i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or (ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service." Courts already have reached the conclusion that those who provide their services under statutory financial assistance programs form an integral part of the statutory scheme and have a property interest in reimbursement for the services they rendered in reliance on the compensation provisions of such programs. *See Brooklyn School for Special Children v. Crew,* 1997 WL 539775 (S.D.N.Y. August 28, 1997).

[15] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order,* 12 FCC Rcd 8776 (May 8, 1997) ("*USF Order*"). In the *Adjustment Order*, the Commission has determined for the first time that the funds disbursed to support eligible schools and libraries will be subject to reimbursement by service providers. Of course, before

for example, states that the service providers' involvement in the program is limited to fulfilling purchase orders from the schools.[16] Acknowledging Congress' intent to require accountability on the part of schools and libraries, the Commission specifically imposed several measures for the independent review of the schools and libraries' applications and technology plans designed to show the use they intended to make of the services that carriers would provide to them.[17]

No corresponding measures were imposed on carriers. Simply because the program directs service providers, rather than the schools and libraries, to seek reimbursement from USAC does not transform carriers into beneficiaries of the program. The carriers have already provided a service to schools and libraries for which they are seeking compensation. The benefit has been conferred on the school or library, and the fact that USAC makes a direct

promulgating a rule, an agency is required to publish general notice of its proposal in the Federal Register, unless those subject to the rules are actually named and either personally served or have actual notice. Therefore, the Commission should have acted only after following the proper rulemaking procedures.

[16] *Id.* at 9006, ¶ 431. *See also, Texas PUC v. FCC*, at 445. The Commission's decision to allow schools and libraries to obtain supported discounts on all commercially available telecommunications services was intended, the court said, "to maximize the schools and libraries' flexibility to *purchase* whatever package of services they need." (emphasis added).

[17] *USF Order*, 12 FCC Rcd at 9076, ¶ 570. Because of the complexity of the technological needs of schools and libraries, the Commission required the appointment of a subcontractor, USAC, that would exclusively manage the application process for schools and libraries. *USF Order*, 12 FCC Rcd at 9076-77, ¶ 571. Under the rules, schools and libraries are required to comply with strict self-certification requirements in all Commission applications, designed to ensure that only eligible institutions receive support.